

NO. 46516-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JUSTIN FESSEL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan L. Clark, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO PROVE BAIL JUMPING

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Fessel contends, for reasons set forth more fully in the opening brief, that the State did not present sufficient evidence to sustain either bail jumping conviction because no evidence showed Fessel was released by a court order. Brief of Appellant (BOA) at 6-14.

The State points to no court order in evidence that released Fessel. Indeed, the State appears to concede no such evidence exists. See Brief of Respondent (BOR) at 4 (“He [Fessel] was *impliedly* under release by court order.”) (emphasis added). Instead, without citing authority, the State asserts jurors could infer Fessel was released by court order because, “when a defendant shows up for a required court appearance, he is under the court’s jurisdiction and not necessarily free to leave. He is only free to

leave if the court allows it[.]” BOR at 4. This is not proof but post hoc conjecture that places the burden on Fessel to prove the absence of a court order releasing him.

The State also cites State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004) and State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004), to suggest the State presented sufficient evidence that Fessel had knowledge of the requirement of a subsequent personal appearance. BOR at 4. This argument fails for several reasons.

First, Fessel does not challenge the fact that he was informed that he was required to be present at court on March 12, 2013 and March 21, 2013. Rather, Fessel argues the State failed to meet its burden of proving he had been released by court order. BOA at 6-14.

Second, courts have repeatedly held that the State is required to prove release by a court order as an element of bail jumping. Accord State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007) (quoting State v. Pope,<sup>1</sup> which recites elements of bail jumping to include that the defendant “was released by court order”); State v. Malvern, 110 Wn. App. 811, 813, 43 P.3d 533 (2002) (reciting elements of bail jumping to include that the defendant “was released by court order”); State v. James, 104 Wn. App.

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<sup>1</sup> 100 Wn. App. 624, 627, 999 P.2d 5, rev. denied, 141 Wn.2d 1018 (2000).

25, 36, 15 P.3d 1041 (2000) (“The corpus delicti [of bail jumping] includes: (1) being released from custody by a court order . . . .”). The State does not respond to these cases.

Finally, here the jury was instructed that release by a court order was an element of bail jumping: “A person commits the crime of Bail Jumping when he fails to appear as required after having been *released by court order*, with knowledge of the requirement of a subsequent personal appearance before a court.” CP 32 (instruction 7) (emphasis added); RP 157. Each of the two bail jumping to-convict instructions required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about [March 12 and 21, 2013 respectably], the defendant failed to appear before a court;
- (2) That the defendant had been convicted of Possession of a Controlled Substance;
- (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That any of these acts occurred in the State of Washington.

CP 33-34 (instructions 8-9) (emphasis added); RP 157-59 (emphasis added).

Jury instructions to which neither party objects become the law of the case and delineate the State’s proof requirements. State v. Hickman,

135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hanes, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Fessel objected to the definitional or to-convict instructions with regard to bail jumping. RP 138-46. In light of these jury instructions, the State was required to prove Fessel had been released by a court order. The State does not dispute this fact.

The State failed to meet its burden of proving Fessel was released by court order. This Court must reverse the bail jumping convictions and remand for dismissal of the charges with prejudice. Hickman, 135 Wn.2d at 99.

## 2. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED FESSEL A FAIR TRIAL

The prosecutor encouraged jurors to reject Fessel's affirmative defense of uncontrollable circumstances, arguing the defense required something more than "just his [Fessel's] word." RP 177. Fessel contends the prosecutor's argument was an improper misstatement of the law. BOA at 16-21.

The State suggests the prosecutor was "simply" arguing Fessel was not credible because he failed to produce corroborative evidence of the accident. BOR at 7. But that is not what the prosecutor said. Rather, the prosecutor argued, "[I]t's not just his word. Proving it by a preponderance

doesn't – is not just that he says it, okay?" RP 177. Under a preponderance of the evidence standard however, how much evidence Fessel presented in support of his affirmative defense was irrelevant so long as the jury believed the evidence that Fessel did present. BOA at 18. Moreover, contrary to the prosecutor's argument to the jury, Fessel's testimony was also corroborated by his trial attorney's testimony that Fessel showed him pictures of the damage to his car. BOA at 18; RP 169-70.

The State also argues that the misconduct was not prejudicial because Fessel's testimony was "disastrous" and he "appeared to not be telling the truth." BOR at 7-8. This line of reasoning is belied by the State's own argument which notes, "the appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence." BOR at 3 (citing Green, 94 Wn.2d at 221). As discussed in the opening brief, the improper misstatement of the law was prejudicial because the prosecutor's statements provided a mistaken avenue for jurors to decide Fessel's guilt and because the trial court failed to sustain defense counsel's timely objection.

B. CONCLUSION

For the reasons discussed above and in the opening brief, Fessel asks this court to reverse his bail jumping convictions and remand for dismissal of those charges with prejudice. In the alternative, this court should reverse Fessel's convictions and remand for a new trial because prosecutorial misconduct deprived Fessel a fair trial.

DATED this 8<sup>th</sup> day of July, 2015.

Respectfully submitted,

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